

Law, Property & Society

Property Rights  
**and** Neoliberalism  
Cultural Demands  
**and** Legal Actions

Edited by Wayne V. McIntosh  
and Laura J. Hatcher

# Property Rights and Neoliberalism

Cultural Demands and Legal Actions

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# PROPERTY RIGHTS AND NEOLIBERALISM

# Law, Property and Society

Series Editor:  
Robin Paul Malloy

The Law, Property and Society series examines property in terms of its ability to foster democratic forms of governance, and to advance social justice. The series explores the legal infrastructure of property in broad terms, encompassing concerns for real, personal, intangible, intellectual and cultural property, as well as looking at property related financial markets. The series is edited by Robin Paul Malloy, and book proposals are welcome from all interested authors.

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# Introduction

Wayne V. McIntosh and Laura J. Hatcher

Over the course of the last several decades, conservative libertarian and neoliberal groups have put constitutional demands for greater property protection on the agendas of courts in several countries, including the US. In addition to working in national courts and through constitutional processes, property rights activists, pressure groups and social movements have used administrative and regulatory mechanisms in their efforts. Meanwhile, in a range of arenas, lawyers and other advocates have diligently worked to include expropriation clauses in international treaties, such as NAFTA, and to structure the rules of conflict and jurisprudence that, in theory, protect the rights of investors, particularly from government encroachment. Indeed, the US-based Property Rights Alliance, an organization with a considerable record of involvement in litigation, legislative, and regulatory processes, has assembled a world-wide coalition of national affiliates to promote a common political-legal agenda, and has begun publication of an *International Property Rights Index*, rating 115 countries on the degree to which governing regimes recognize the sanctity of private property and its “protection for economic well-being”.<sup>1</sup>

Property rights have always held high status on the US political agenda and in many systems featuring a corporate capitalist economy. These rights are included in constitutional designs, debates, and development. Efforts to curb state appropriation of private properties for public purposes also have a long and storied history. The modern libertarian movement in the US (which has a familial relationship with neoliberalism abroad) has coupled animosity toward direct government seizures with resistance against regulatory regimes by attempting to demonstrate specific regulatory effects that allegedly diminish property values. According to this design, whether it is direct or indirect, government policy that penetrates the boundaries of private property violates a basic tenet of fundamental liberty. Ultimately, the effort appears to place cultural demands for property in a new light, both in the US and throughout the world. This collection provides a range of perspectives on these phenomena.

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1 See <http://internationalpropertyrightsindex.org>.

## **Property Rights in Neoliberal Contexts**

In the case of property rights, neoliberalism's role matters in part because it has, over the course of the last half of the twentieth century, responded to and been a part of restructuring our notions of property and the institutions that regulate it. "Neoliberalism," however, is notoriously difficult to define and readers should not be surprised to find some tensions in the nuances discussed by the various authors in this volume. Tackling the problem of definition early on in this project, we asked our authors to use a broad understanding from Harrington and Turem's 2006 article, "Accountability in Neoliberal Regulatory Regimes." In it they define neoliberalism as implying "the (re)emergence of the market and economic rationale as the dominant organizing logic in society" (Harrington and Turem 2006: 204). Part of this process includes "the dismantling of the welfare state, erosion of social provisions, turn to monetarism in fiscal and financial management, tax cuts for business, and increasing disciplining of the state via markets and market mechanisms" (ibid. 204–205). Similarly, David Harvey points out that the role of the state in this process is to "create and preserve" institutional frameworks that are appropriate for these practices (Harvey 2005: 2). Since property rights are fundamental to the market, understanding how property rights are structured as well as wielded to make claims seems an important element of understanding how these institutional frameworks come into being.

Moreover, when property rights are restructured or new forms of property are created, power shifts in a society. Distribution of property, its uses, and whether owners of new forms of property will be granted the same rights as owners of traditional property, all become elements of restructured power. This strongly suggests that when property rights are mobilized by activists, we are seeing not only an attempt to shift societal structures, but also a symptom that structures have already shifted. Sometimes this happens as official actors attempt to regulate new property forms. At other times, this happens as different forms of knowledge (i.e., science, social science, and so on) challenge the way property is traditionally understood either through new forms of property or by highlighting how recognized rights of old forms of property do not work with a new invention or discovery. For example, do we own our own genetic material? Do the scientists who discovered the processes for studying genes (or any other patentable process for studying biology, genetics, and so forth) own the material they can isolate, examine, and convert into marketable commodities? Does their right to the process itself extend to the object of that process? Or is this part of a base of knowledge to which all humans should have access? Most importantly, how does the political struggle that takes place over such issues restructure power and create political claims?

Clearly, no longer is the idea of property tied simply to land or real estate. Instead, we now recognize property in our ideas, our genetic material, bandwidths, as well as in stocks, bonds and various other "things" we claim to own. In the face of scientific innovation, this becomes even more complicated in a context where the free market of ideas is supposed to dominate the way we create and

accumulate knowledge. But scientific innovation even places pressure on old forms of property, such as land. Here is an object whose property value we often think we already understand and that its core property meaning has been established. Yet we find that market issues have changed our understanding of ownership, of what can be “owned,” and what owners can do with their land. Moreover, scientific developments that challenge old understandings of land use, as well as market forces that push us to redevelop land for new purposes, strain these supposedly settled understandings. The law responds to changing technology and market forces by adapting and attempting to regulate land in new ways. But if law stipulates what uses we can make of our land, and some uses will be more profitable than others, can we claim a property right in the lost value associated with uses that are deemed unacceptable? And how is a right to use land for economic development different from the set of rights that accrue to an owner who uses the land for a home?

As new forms of property are created, it is no wonder that property rights claims become a means of contesting not only their regulation, but their very character. We ask the questions above not as normative political theory, with an eye to what the law *should* say, but rather because we are curious about how law is changing to meet the demands of new technologies and market forces in an era of neoliberal regulatory reform. A close analysis of property rights mobilizations highlights the tensions within concepts such as “the public good” and “private rights.” These tensions seem unavoidable in a context where market logics represent the dominant organizing rationales for society. As Laura Hatcher explains in her chapter, such issues make traditional matters of land use planning much more difficult for the state as it also attempts to struggle with demands from property rights owners to develop land for economic use. New technologies also stimulate tensions in part because of the new forms of property they create. Victoria Henderson’s chapter presents us with an example of where activists in other countries see private ownership of bandwidth to be troubling because it interferes with public discourse, while Andrea Boggio shows that the discovery of genetic materials and the desire of scientists to pursue their findings raises questions concerning who has control over both the genetic material and cultural heritage. These chapters suggest that when property changes shape or a new form of property is introduced in political contexts where the understanding of property is itself in a state of flux, how to structure the rights of owners and what, if any, regulation is appropriate become matters for mobilization. Authors in this volume highlight that these contests are not merely about gaining a political advantage in a regulatory environment; rather, they remain very much about the way we should understand property and the rights associated with it in the midst of contentious politics concerning neoliberal deregulation and (re)regulation.

## **Mobilization's Many Forms**

Mobilization of law can take a variety of forms, all of which are aimed at creating advantages through the law for a particular policy objective or ideological perspective. It can be part of a strategic plan to promote or enhance a set of strictly parochial interests, or it can be more globally oriented and intended to elevate the likelihood of future benefits. Moreover, mobilization can involve activating legal institutions (courts, agencies, and the like) by placing a set of issues on the agenda for decision, leveraging the process, thus setting the machinery in motion and forcing the other side to face the expensive proposition of mounting a credible formal response, and influencing the language and understanding of law in the books and/or on the street. Indeed, successful litigation leading to a series of reinforcing official decisions and pronouncements can have secondary influences, elevating rights consciousness and casting a shadow over subsequent actions and negotiations. This allows interested parties to leverage the language and meaning of law without a full-dressed show of force.

The most visible mobilization action is to directly engage the process, by leading a litigation effort, joining a coalition to support a case in progress, and related activity. This was among the earliest to attract scholarly attention (e.g., Scheingold 1978, McCann 1994). High profile advocacy, especially that challenging racial segregation, and similar efforts from liberal-leaning organizations and public interest law firms supporting such positions as expansion of women's rights, rights of criminal defendants, and environmental protection, to name a few, seemed to have engineered considerable policy movement, but also gave rise subsequently to counter-advocacy from the right (e.g., Hoover and den Dulk 2003, den Dulk 2006, McCann and Dudas 2006, Southworth 2008, Teles 2008).

We extend this literature on legal mobilizations by presenting a series of case studies that consider, specifically, property rights mobilizations in an era of changing regulatory schemes. Conservative and neoliberal organizations, by the 1970s, gained their legal footing and developed serious strategies to promote private property rights, to offset regulatory interference, and generally to shift political power away from the state and to the market. Among the first to arise, and subsequently most active and influential, was the Pacific Legal Foundation, established in 1973 to promote market-based solutions to public policy issues. The group has also joined forces with other like-minded advocates such as the Institute for Justice, to become a major force in promoting their preferred positions on social policy issues.

We know from past mobilization analyses that rights claims are structured in relation to the law as it is, even when activists are trying to change it. Thus, activists both take advantage of the law as a resource, but also recreate it through various claims concerning both the law's legitimacy and particular rights. The contributors to this volume bring a range of social science perspectives to address three primary issues: 1) the contours and characteristics of property rights mobilization(s); 2) the degree to which property rights movements have influenced development of law in



demonstrable ways; and 3) the broader cultural, social and economic implications of modern-era property rights litigation and legal mobilizations.

In Part I, the Schultz, Thorpe-Evans-Simon-McIntosh, Wilkerson, and Becher chapters report a significant presence by these organizations in high-level litigation to advocate for private property rights and pro-market positions in US courts as part of a concerted effort to change the understanding of constitutional “takings” law. David Schultz explains why courts matter to this area of research. Using the US as his case study, Schultz argues that courts are strong and efficient sites for creating legal change. Shifting gears slightly, Rebecca Thorpe, Michael Evans, Stephen Simon, and Wayne McIntosh consider how third-party advocacy in the US system creates unusual coalition patterns, uniting conservative and liberal advocates in ways that change over time and may influence the ways in which justices in the US Supreme Court engage the issues. Focusing upon the famous US takings case, *Kelo v. City of New London*, William Wilkerson describes the legal mobilization by the Institute for Justice on behalf of Susette Kelo. He considers the intertwined political and legal strategies that this public interest law firm uses, and assesses their effectiveness in meeting their goals of legal change, while at the same time, promoting the organization itself. Finally, Debbie Becher moves to the ground level to explore a spirited non-litigation mobilization effort in a Philadelphia neighborhood targeted for an eminent domain development project in the aftermath of *Kelo*. She reports that the way in which the concepts of “home” and “property” were conflated in *Kelo* opinions, ultimately served the agenda of neoliberal organizations who found a receptive audience in the “threatened” community and their supporters.

In Part II Victoria Henderson turns our attention to Guatemala, addressing private property rights in the electromagnetic spectrum as specified in that country’s 1996 telecommunications reform. She traces the intellectual roots of neoliberal reform and assesses the impact of the legal change, finding that commodification of this traditionally collectively held resource exacts costs that disproportionately fall upon Guatemala’s indigenous population. In the next chapter, Andrea Boggio addresses the question of whether we hold property rights to our genetic code, with research based in a study of indigenous peoples of Papua New Guinea and intellectual property issues arising from commercial exploitation of their DNA samples. In recent years, advocates on behalf of vulnerable populations have demanded that the international community recognize that genetic resources belong to the populations from which the resources are extracted and have mobilized in opposition to a neoliberal biocolonial agenda. Finally, Gabrielle Clark and Christine Harrington find that indeterminacy in the framework of NAFTA has created opportunities to influence domestic as well as international relationships. They argue that government respondents in investors’ rights arbitration at the international level have altered the treaty’s normative framework through their claims. Taken together, the three papers strongly suggest that the unintended consequences of meaning making in these disputes includes the subversion of the state (while reinforcing the state), as well as undermining the claims made by libertarian and neoliberal activists.